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85-302

Supreme Court, U.S.
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JUL 30 1985
JOSEPH F. SPANIOL, JR.
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SUPREME COURT NUMBER____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

BETTY JEAN MONTGOMERY,
Petitioner

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

1. Whether evidence of prior crimes of the accused can be introduced through the oral testimony of the prosecution's witnesses before the defendant had first put her character in issue?

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STATUTES

Amendments V, XIV to the United States Constitution 2,9

OPINIONS BELOW

The petitioner was found guilty of the charge of arson in the second degree in the Circuit Court of Baldwin County, Alabama on June 1, 1984. On March 12, 1985, the Alabama Court of Criminal Appeals affirmed this conviction without rendering an opinion. The petitioner's application for rehearing was likewise denied without opinion by the Alabama Court of Criminal Appeals on April 9, 1985.

JURISDICTION

The judgment of the Alabama Supreme Court denying your petitioner's petition for Writ of Certiorari was entered on May 31, 1985, without opinion. This Court has jurisdiction to entertain this Writ of Certiorari under the provisions of 28 U.S.C. § 1257.

STATUTES AND RULES OF COURT INVOLVED

The following are the Constitutional provisions involved on appeal:

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, excepting cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, §1

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 30, 1984, petitioner-defendant Betty Jean Montgomery's home was damaged by fire. (R.10). Following this fire, an investigation was made to determine the source and origin of the fire. During this investigation, firemen and arson investigators found unused newspaper scattered through the house and detected the presence of gasoline. (R.15-19).

The petitioner-defendant first arrived on the scene of the fire approximately fifteen to twenty minutes after the firemen had gotten to the scene. (R.21). At the time the alleged fire occurred, the petitioner-defendant was at a local laundromat and had been there for some period of time. (R.91).

On January 27, 1984, the petitioner was indicted by the Baldwin County

Grand Jury on the charge of arson in the second degree. (R.129). Trial was had in this cause on May 31st through June 1st, 1984 in the Circuit Court of Baldwin County, Alabama. At the conclusion of this trial, the petitioner was found guilty of the charge of arson in the second degree in connection with the alleged burning of her home.

Following a pre-sentence investigation, as well as a psychiatric evaluation, the petitioner was sentenced on September 27, 1984 to ten years in the state penitentiary. On that date the petitioner gave her oral notice of appeal. On appeal to the Alabama Court of Criminal Appeals, the petitioner presented two issues for appellate review. The first issue concerned whether the burning of the home by accidental and natural causes was

satisfactorily excluded to constitute sufficient proof of arson committed by the petitioner through direct or circumstantial evidence. The second issue, which is also the question presented to this Court, was whether evidence of prior crimes of the petitioner could be introduced through the oral testimony of the prosecution's witnesses before the petitioner had first put her character in issue.

The incident during the trial of this case which gives rise to the instant appeal occurred during the direct examination of Chief Philip Bryars of the Bay Minette Fire Department. (R.32). The pertinent colloquy of his testimony is as follows, to-wit:

> By Ms. Minic:
> Did you have an occasion to talk to her at that time?
>
> A. The fire marshall did.

Q. And were you present when he spoke to her?

A. Yes, maam.

Q. And did he question her as to who she thought might have started the fire?

A. Yes, maam, he did.

Q. And was she able to give him any information or a suspect?

A. He had asked her if she might know of anybody who had a grudge against her or anything like that. She said that the people in the neighborhood didn't like her and stuff like this. And said she had an idea of who it was but didn't want to give out any names.

And said as soon as she was off her parole, she would take care of it.

Q. Take care of it?

Mr. Cherry:

Judge, I'm going to object. It was non-responsive and I am going to ask for a mistrial.

The Court: Overruled.

Mr. Cherry:

Except.

It is the petitioner's position that the trial court erred to reversal by not granting a mistrial with respect to the witness' statement regarding the petitioner being on parole. Such testimony by the witness was unresponsive and that the import of such testimony was to impeach the petitioner's character and reputation. This was improper inasmuch as the petitioner had not put her character in issue at the time this harmful testimony was elicited.

REASONS FOR GRANTING THE WRIT

The accused has a valued right not to have to testify at trial. U.S. CONST. amends. V and XIV. Consequently, the prosecution cannot go directly into the defendant's character until the defendant has placed his character in issue. Headley v. State, 51 Ala. App. 148, 283 So. 2d 458 (1973). The exclusion of prior crime evidence is one of the most fundamental notions known to our law. United States v. Beno, 324 F.2d 582, 587 (2d Cir. 1963). This principle arises "out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence." Lovely v. United States, 169 F.2d 386, 389 (4th Cir. 1948).

The prohibition against the introduction of evidence of prior crimes is

founded upon the principle that since the accused has a Constitutional right against self-incrimination, this right cannot be compromised by the introduction of evidence which tends to impeach the accused's character and credibility. The accused may be impeached by the introduction of past crimes involving moral turpitude or those tending to show a common scheme, plan, or motive, but only after the defendant has put his credibility in issue.

The trial court seriously infringed upon the petitioner's right against self-incrimination by not granting the petitioner's motion for a mistrial after the prosecution witness referred to the petitioner's prior criminal record. This error was affirmed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. The ruling of

the state appellate court in this instance is repugnant to the Constitution and incompatible with the previous decisions of this and other federal courts.

CONCLUSION

The petitioner submits that the issue posed above involves an important Constitutional consideration. This question should therefore be resolved by this Court.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 30, 1985

CERTIFICATE OF SERVICE

I, W. Donald Bolton, Jr., the attorney for the petitioner, hereby certify that the number of copies of this petition required by Rule 28 of the Supreme Court Rules have been served on the opposing party in this proceeding by mailing three copies of the petition to the Attorney General of the State of Alabama, by certified mail, return receipt requested, first-class postage prepaid, addressed to The Honorable Richard L. Owens, Assistant Attorney General of the State of Alabama.

DONE this 30th day of July, 1985, by depositing the same in the United States post office, with first-class postage prepaid, and properly

addressed to the Clerk and parties indicated hereinabove on this date.

CERTIFICATE OF FILING

I, W. Donald Bolton, Jr., the attorney for the petitioner, hereby certify that the number of copies of this petition required by Rule 19 of the Supreme Court Rules to be filed, to-wit, an original and forty (40) copies, with the Clerk of the United States Supreme Court, were placed by me in the United States Mail, certified, return receipt requested, first-class postage prepaid, addressed to The Honorable Alexander Stevas, Clerk of the United States Supreme Court, pursuant to the provisions of Rule 19 of the Supreme Court Rules, on the date indicated below.

W. DONALD BOLTON, JR.
Attorney for Petitioner

Sworn to and subscribed
before me on this the
30th day of July, 1985.

NOTARY PUBLIC

My Commission Expires: